

Citing similar concerns about the harm of disclosure of confidential data, SWB is even more extreme.<sup>62/</sup> SWB claims that parties use the complaint process simply to obtain access to confidential data. In an apparent effort to wish away the Freedom of Information Act and all discovery rules, SWB states that the provisions in subsections (c) and (d) of the proposed Section 1.731, relating to maintenance of a copy log, are "unworkable" because the log could not be verified and unauthorized persons could look at the confidential material without copying it. Accordingly, SWB proposes that only one copy of the confidential information be made available, and only to the Commission. The Commission could only make it available for the other party to "view" at the Commission, but not to "copy[]" or "read[]," or to cite in any filing, and only if the information is necessary for that party's prima facie case or defense.<sup>63/</sup>

SWB does not explain the difference between "viewing" and "reading" information, or what the purpose of such "viewing" would be if the party could never refer to the information in a subsequent filing. Both Bell Atlantic's and SWB's comments are essentially irrelevant to this discussion because they refuse to

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<sup>62/</sup> SWB, at 3, expresses great concern for the "harm" that might befall its customers from the disclosure of information "entrusted to SWBT by its customers," but that does not appear to be a problem where customer proprietary information is released to personnel involved in SWB's enhanced services operations.

<sup>63/</sup> SWB Comments at 3-5.

recognize the reality that relevant confidential information otherwise discoverable must be turned over to the opposing party under protective order. That is the procedure at the Commission now under the formal complaint procedures<sup>64/</sup> and the Commission's rules applying the Freedom of Information Act,<sup>65/</sup> as well as in the federal courts.<sup>66/</sup> The only question is how to structure the confidentiality rules so that the opposing party is not hamstrung in its use of the information while the information is accorded all of the protection required to prevent commercial harm to the producing party. Since neither Bell Atlantic nor SWB is willing to address that balancing issue, their comments on confidentiality are essentially useless and should be ignored. The Commission's proposed confidentiality rules, modified as discussed above, should be adopted.

Opinion is more divided on the proposed bifurcation of complaint cases into liability and damages phases. As BellSouth and GTE point out, early damages discovery can often facilitate settlement. Prohibiting damages discovery completely until the damages phase thus might frustrate the Commission's intent to promote settlement negotiations before commencement of the

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<sup>64/</sup> See MCI Telecommunications Corp. v. Bell Tel. Co. of Pa., 4 FCC Rcd 6767 (1989) (confidentiality order governing material produced in discovery).

<sup>65/</sup> See 47 C.F.R. § 0.461.

<sup>66/</sup> See Fed. R. Civ. P. 26(c)(5)-(8) (providing for protective orders to maintain confidentiality of evidence produced in discovery).

damages phase. It thus might be preferable to allow some damages discovery during the liability phase.<sup>67/</sup> Moreover, the bifurcation procedure is bound to lead to disputes over whether discovery requests relate to liability or damages. Many factual issues present mixed questions of liability and damages.<sup>68/</sup>

If the Commission does adopt the bifurcation proposal, therefore, it will have to state clearly that a particular discovery request relating to both liability and damages must be allowed during the liability phase. In addition, the Commission must be more careful about what is considered purely damages discovery. As Pacific Bell points out, the Notice uses the terms "injury" and "damages" interchangeably in its discussion of this proposal. "Injury," however, is an element of liability, not damages.<sup>69/</sup> Only discovery requests relating solely to the amount of damages should be prohibited during the liability phase.<sup>70/</sup>

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<sup>67/</sup> BellSouth Comments at 4; GTE Comments at 5.

<sup>68/</sup> BellSouth Comments at 4; DC PSC Comments at 5.

<sup>69/</sup> Pacific Bell Comments at 3-4.

<sup>70/</sup> The Commission might also consider Continental Mobile's suggestion, at 4, that there be fewer restrictions on discovery once the damages phase is reached (e.g., no limit on the number of interrogatories, etc).


Conclusion

Generally, more vigorous supervision of formal complaint cases through the use of status conferences and the administering of sanctions should address whatever problems of delay may be perceived in the formal complaint process, without inflicting the multiple harms that the Commission's deadline-shortening proposals would cause. Most of the proposals in the Notice should therefore be rejected. Adoption of the confidentiality rules, however, with most of the changes suggested in the comments, should facilitate the fair resolution of complaint cases involving discovery of confidential information.

Respectfully submitted,

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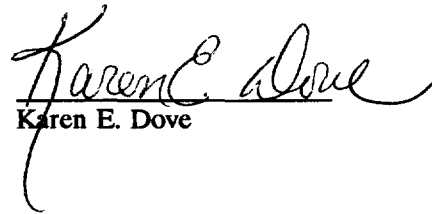
  
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Dated: May 11, 1992

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I, Karen E. Dove, hereby certify that copies of the foregoing "REPLY COMMENTS," in CC Docket No. 92-26, were served by first-class mail, postage prepaid, this 11th day of May, 1992, on the persons listed as attached hereto:

  
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